

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-21441

To be argued by
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
p/s

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KENDALL BROWN, :

Petitioner-Appellant, :

-against- :

JOHN WILMOT, Superintendent of Elmira :
Correction Center, and LOUIS J.
LEFKOWITZ, Attorney General of the State:
of New York,

Respondents-Appellees. :
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BRIEF FOR RESPONDENTS-APPELLEES

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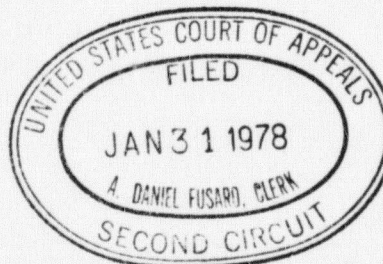


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UNITED STATES COURT OF APPEALS
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KENDALL BROWN, :

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JOHN WILMOT, Superintendent of Elmira :

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LEFKOWITZ, Attorney General of the State:
of New York*,

Respondent-Appellees. :

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APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-APPELLEES

Preliminary Statement

This is an appeal from an order of the United States
District Court for the Southern District of New York (Werker, J.)

* Where the petitioner is presently incarcerated pursuant to the state judgment in question the proper respondent in an application for a writ of habeas corpus is the state officer having custody of the petitioner. Rule 2(a), Rules Governing Section 2254 Cases in the United States District Courts. The Attorney General of the State of New York, therefore, is not a proper respondent.

entered October 14, 1977 denying, without a hearing, appellant's petition for a writ of habeas corpus. The District Court granted a certificate of probable cause on November 14, 1977.

Questions Presented

1. Did petitioner fail to satisfy the exhaustion of state remedies requirement, 28 USC §§ 2254(b),(c), barring habeas corpus relief?

2. Does a state court's denial of bail pending appeal without a statement of the reasons therefor on the record constitute an arbitrary denial in violation of the Eighth and Fourteenth Amendments?

Statement of Facts and Procedural Background

Petitioner-appellant (hereinafter, "petitioner") was convicted after a jury trial in the Supreme Court, Bronx County (Harold J. Silberman, Justice) of the crime of robbery in the first degree (Penal Law § 160.15) and on June 13, 1977 was sentenced to an indeterminate term of imprisonment not to exceed seven years. Petitioner is presently incarcerated in the Elmira Correction and Reception Center, Elmira, New York.

On June 14, 1977 petitioner filed notice of appeal from the judgment of conviction of the trial court. This appeal is currently pending before the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

In a motion returnable on July 11, 1977 before a justice of the Appellate Division, First Department, petitioner sought bail pending appeal. Petitioner and the District Attorney of Bronx County submitted affidavits and memoranda. Neither requested oral argument. On July 21, 1977 the motion for bail pending appeal was denied by the Appellate Division, First Department, (Harold Birns, Justice) without stated reasons for the denial on the record, Appendix, 57.*

Petitioner then filed an application for habeas corpus relief in the United States District Court for the Eastern District of New York. Specifically, petitioner sought an order requiring his release on bail, or in the alternative, requiring release but staying enforcement of the order, pending a state court hearing on the bail issue. The Appellate Division would then be required either to set reasonable bail or to state the reasons for the denial on the record.

* Page references are to the Joint Appendix in this Court.

In his decision of October 13, 1977, Appendix, 58-63, Judge Werker denied the writ of habeas corpus, stating: 1) Petitioner has exhausted his remedies available under state law, as the denial of his application for bail is not appealable within the court system of the State of New York. 2) While there is no constitutional right to bail pending appeal, such bail may not be denied arbitrarily to those who apply for it. However, the failure to provide reasons on the record for the denial of bail pending appeal is not per se arbitrary. 3) The federal district court is not authorized to substitute its judgment on the merits of the bail application for that of the justice of the Appellate Division. The appropriate federal habeas corpus review is, therefore, confined solely to the issue of whether petitioner's Eighth and Fourteenth Amendment rights were denied by the absence of reasons for the denial of bail stated on the record. 4) As petitioner had a full and fair opportunity to present his request for bail to the Appellate Division and the subsequent decision denying bail was rendered in accordance with the law of the State of New York. 5) A federal habeas corpus relief is inappropriate. The procedure employed by the State carries with it a presumption of regularity. To rebut this presumption petitioner must show that the record provided no rational basis for the denial of

bail. This petitioner failed to do. 6) In light of the seriousness of the charge and the argument of the District Attorney, which was neither frivolous nor conclusory, as to why the appeal is without merit, the Court had ample reason to deny bail. 7) To order the Appellate Division to state on the record its reasons for the rationally based denial of bail would amount to nothing more than an exercise in futility.

POINT I

PETITIONER HAS NOT SATISFIED
THE EXHAUSTION OF STATE REMEDIES
REQUIREMENT

In Picard v. Connor, 404 U.S. 270, 275, 278 (1971), the Supreme Court held that the substance of a federal habeas corpus claim must be fairly presented to the state courts before a federal court will entertain the petition. This requirement, codified at 28 USC § 2254(b)(c), reflects the policy of federal-state comity, providing the state with the initial opportunity to pass upon and, if necessary, correct alleged violations of its prisoners' federal rights and avoiding the "unseemly" alternative. Id. at 275. See also Fielding v. LeFevre, 548 F. 2d 1102, 1106-1107 (2d Cir. 1977).

In the present case it is not disputed by petitioner that the substance of his claim, that is, the constitutional

question, has never been presented to the New York courts. Instead petitioner argues that the exhaustion of state remedies requirement has been met as there are no such remedies available to him. This Court stated that the burden of proving an absence of state remedies rests with the petitioner, United States ex rel. Emerick v. Denno, 328 F.2d 309, 310 (2d Cir. 1964), and in the present case this burden has not been met.

While CPL § 460.50 provides that only one application for bail pending appeal may be made and there is no statutory provision permitting direct appeal from a denial of such bail, it is far from clear that petitioner cannot obtain collateral review in state court of the constitutional question he seeks to raise here.

The unavailability of direct appeal in state court will not alone relieve petitioner of his obligation to exhaust state remedies. 28 USC § 2254(c) provides:

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented. [Emphasis added].

This requirement has not been met where the issue raised in the federal habeas corpus proceeding has not been presented to the state courts and could be raised in a state habeas corpus proceeding. Ex Parte Williams, 317 U.S. 604 (1943); United States ex Rel. Bryant v. Vincent, 373 F. Supp. 1180, 1183 (SDNY 1974).

The New York CPLR, Art. 70, apparently permits petitioner to raise the constitutional issue presently before this Court in the New York State Courts by petitioning for a writ of habeas corpus. CPLR § 7002 provides that a petition for habeas corpus may be brought by "A person illegally imprisoned or otherwise restrained in his liberty within the state. . . ." The New York courts have held that the state habeas corpus proceeding may appropriately be used to test the claim that the petitioner has been imprisoned after having been deprived of a fundamental constitutional right. People ex rel. Keitt v. McMann, 18 N Y 2d 257, 262 (1966). See also: United States ex rel. Bryant v. Vincent, supra, 373 F. Supp. at 1183 People ex rel. Smith v. Deegan, 32 A D 2d 940, 944, (2d Dept. 1969).

The cases relied upon by petitioner in support of the proposition that state habeas corpus will not lie to challenge

the denial of bail pending appeal and People ex rel. Holtzman v. Malcolm, 50 A D 2d 746 (1st Dept., 1975) rely upon People ex rel. Epton v. Nenna, 25 A D 2d 518 (1st Dept. 1966). There the petitioner attempted to have a second trial judge substitute his discretion for that of the judge who denied bail. Thus, the petitioner in People ex rel. Epton v. Nenna was not claiming any constitutional infirmity in the denial of bail. He was simply alleging abuse of discretion. Id. In the present case, however, petitioner is not simply asking for a substitution of the discretion of the reviewing judge for that of the first judge. Petitioner is seeking a declaration that the procedure used by the first judge was unconstitutional. As the present case, unlike People ex rel. Epton v. Nenna, supra, involves a question of constitutional magnitude, a state habeas corpus proceeding would apparently lie. See People ex rel. Keitt v. MaMann, supra, 18 N Y 2d at 262.

New York law has been interpreted as quite possibly permitting a constitutional challenge to a denial of bail pending appeal to be raised in a state habeas corpus proceeding. In United States ex rel. Carmona v. Ward, 416 F. Supp. 272, 274-275 (SDNY 1976) appeal pending on other issues, the Court did not interpret People ex rel. Epton v. Nenna, supra, as precluding the petitioner from raising her constitutional claim

in a state habeas corpus proceeding, even though that claim related to eligibility for bail pending appeal. Like Carmona, the present case presents the Court with allegations of a constitutionally impermissible denial of bail. While, as petitioner notes, the constitutional issues in United States ex rel. Carmona v. Ward, supra, and the present case are different, the principle is the same. Given the apparent availability of a state habeas corpus proceeding to test the constitutionality of detention, the allegation of a constitutional infirmity in the bail proceeding, and the admittedly uncertain state of the law of New York, the policy expressed in 28 USC §§ 2254(b) and (c) requires the petitioner to challenge the constitutionality of the detention in a state habeas corpus proceeding prior to resorting to the federal courts United States ex rel. Carmona v. Ward, supra, 416 F. Supp. at 274-275. In so holding the Court:

avoid[ed] the unnecessary -- and perhaps erroneous -- interpretation of New York State procedural law which would be implicit in a determination of this time that the petitioner has exhausted his remedies in the state courts. [Id. 416 F. Supp. at 275].

Notwithstanding the uncertain state of the law of New York petitioner should be required to attempt to raise his constitutional claim in state court. Whether the state courts will entertain a proceeding for collateral relief "is a matter of New York law to be decided by New York courts and not by federal court predictions of what stances those courts will take." Wilson v. Fogg, ____ F 2d ____, slip op. 291 (2d Cir. January 19, 1978. See also Cameron v. Fastoff, 543 F 2d 971, 978 (2d Cir. 1976). This Court has often held that a petitioner who may have a state remedy must seek that remedy before resorting to the federal courts.

[E]ven if there were some doubt as to the availability of relief in the New York courts, we would still give its courts the first chance to review their alleged errors so long as they have not authoritatively shown that no further relief is available Wilson v. Fogg, supra, slip. op. 29 (2d Cir. January 10, 1978) quoting from United States ex rel. Bagley v. LaVallee, 332 F 2d 890, 892 (2d Cir. 1964)]

See also United States ex rel. McGrath v. LaVallee, 348 F 2d 373 (2d Cir. 1965), cert. den. sub nom. McGrath v. McMann, 383 U.S. 952, reh. den. 384 U.S. 923 (1966) United States ex rel. Tangredi v. Wallack, 343 F 2d 752, 753 (2d Cir. 1965) United States ex rel. Martin v. Murphy, 319 F 2d 897 (2d Cir. 1963).

As a matter of comity, the state courts should be afforded the opportunity to determine whether the unexhausted issue may be litigated in its courts. Pruitt v. Hutto, 542 F 2d 458, 459 (8th Cir. 1976).

Petitioner has failed to meet his burden of proving that he has no state remedy. The petition, therefore, should have been dismissed for failure to exhaust state remedies.

POINT II

THE DENIAL OF BAIL AFTER CONVICTION
WITHOUT STATED REASONS ON THE RECORD
DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

To obtain relief in the federal courts petitioner must show that, in addition to having exhausted all state remedies, he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 USC § 2254(a). This he has failed to do.

There is no constitutional right to bail after conviction in state court even where an appeal from that conviction is pending. Roberson v. Connecticut, 501 F 2d 305, 308 (2d Cir. 1974); United States ex rel. Cameron v. New York, 383 F. Supp. 182, 183 (EDNY 1974); United States ex rel. Siegal v. Follette,

290 F. Supp. 632, 635 (SDNY 1968). Thus, petitioner's claim that his Eighth Amendment rights have been violated is without basis.

Although Rule 9(b) of the Federal Rules of Appellate Procedure mandates that the federal courts state on the record the reasons for the denial of bail pending appeal, United States v. Manarite, 430 F 2d 656 (2d Cir. 1970), this rule is not a constitutional requirement and is not applicable to the state courts. Appendix 61; United States ex rel. Walker v. Twomey, 484 F. 2d 874, 876 (7th Cir. 1973).

Although an arbitrary denial of a right given by the state violates the Fourteenth Amendment, not every abuse of discretion rises to the level of a constitutional deprivation. Such abuses are ordinarily "for a State reviewing court to rectify, if review is permissible." United States ex rel. Cameron v. New York, supra, 383 F. Supp. at 184; Starkey v. Swenson, 370 F. Supp. 595, 596 (E.D. Mo. 1974). This Court has expressed "grave doubts" that determinations which are "clothed in broad discretion" under the provisions of state law can be questioned in federal court on collateral attack. United States ex rel. Brown v. LaVallee, 424 F 2d 457, 458, n. 2 (2d Cir. 1970), cert den. 401 U.S. 942

reh. den. 402 U.S. 990 (1971). Both the Sixth and Tenth Circuits have emphasized that Federal District Courts do not sit as appellate tribunals to review the discretionary granting or withholding of bail pending appeal in the state courts. Bloss v. Michigan, 421 F. 2d 903, 906 (6th Cir. 1970); Hamilton v. New Mexico, 479 F. 2d 343, 344 (10th Cir. 1973). Accord, United States ex rel. Siegal v. Follette, supra, 290 F. Supp. at 635; Starkey v. Swenson, supra, 370 F. Supp. at 596.

Only where the petitioner alleges an abuse of discretion consisting of a total failure to consider an application as required by law or a decision infringing upon an otherwise protected area such as race or religion may the federal habeas corpus court properly intercede. United States ex rel. Cameron v. New York, supra, 383 F. Supp. at 184; United States ex rel. Siegal v. Follette, supra, 290 F. Supp. at 635. In the absence of such a constitutional issue, the specifics of bail proceedings, even those conducted in the pre-trial setting are "patently of prime concern to the state." See Wallace v. Kerner, 520 F. 2d 400, 405, 406 (2d Cir. 1975) cert. den. 424 U.S. 912.

In United States ex rel. Walker v. Twomey, supra 484 F. 2d 874, the Court rejected the argument that a denial

of bail pending appeal without a statement of the reasons therefore on the record is arbitrary per se. The Court reasoned that, as a presumption of regularity attaches to all decisions of the state courts, Johnson v. Zerbst, 304 U.S. 458, 468 (1938), and not merely those accompanied by oral or written explanations, the petitioner has the burden of showing that the record provides no rational basis for the decision. United States ex rel. Walker v. Twomey, supra, 484 F 2d at 876. Accord, Natal v. Puerto Rico, 424 F. Supp. 1082 (D. P.R. 1975); Starkey v. Swenson, supra, 370 F. Supp. at 596, United States ex rel. Kane v. Bensinger, 350 F. Supp. 181, (ND. Ill. 1972), aff'd sub nom. United States ex rel. Walker v. Twomey, supra, 484 F. 2d 874; see also United States ex rel. Cameron v. New York, supra, 383 F. Supp. 182.

Petitioner has failed to meet this burden. In the memorandum opinion below Judge Werker commented that the seriousness of the offense (robbery in the first degree) of which petitioner was convicted provided the Appellate Division with sufficient reason to deny bail pending appeal, Appendix, 60. The District Court noted further that the Appellate Division was presented with "non-frivolous reasons, based on the record" as to why the appeal would fail. Id at 62.

Petitioner relied upon United States ex rel. Abate v. Malcolm, 397 F. Supp. 715 (EDNY 1975) vacated 522 F 2d 826 (2d Cir. 1975) below as authority within this Circuit supporting his position. It is apparent that the Abate court drew heavily upon United States ex rel. Keating v. Bensinger, 322 F. Supp. 784 (N.D. Ill. E.D. 1971). The latter case, however, has been overruled. United States ex rel. Walker v. Twomey, supra, 484 F 2d 874. The Abate Court twice noted that its result was necessitated by the facts of that case. United States ex rel. Abate v. Malcolm, supra, 397 F. Supp. at 716, 717, facts which Judge Werker noted are significantly different from those of the present case. Appendix, 61-62.

The petitioner in Abate was convicted of the non-violent crime of possession of stolen property and was sentenced to a term of one year in prison. Thus the Abate Court noted that it was unlikely that the appeal would be heard before most or all of the term was served. United States ex rel. Abate v. Malcolm, supra, 397 F. Supp. at 716. Petitioner herein was convicted of first degree robbery and was sentenced to seven years in prison.

* Although the issue of exhaustion of State remedies apparently was not before the Court, it may be noted that petitioner in Abate moved to re-argue his motion before the Appellate Division and then made application to Judge Fuchsberg of the New York Court of Appeals. Only after relief was denied did petitioner in Abate resort to the Federal courts. 397 F. Supp. at 716

In Abate the petitioner presented the District Court with "good arguments for presentation to the Appellate Division on his appeal," while the prosecutor relied upon his conclusory statement that the appeal was without merit. United States ex rel. Abate v. Malcolm, supra, at 717. Judge Werker noted that this is not the case here, where the prosecutor's arguments are "non-frivolous" and "based upon the record" Appendix 60, see Affidavit and Memorandum of the District Attorney of Bronx County, Appendix 34-43. Thus, the Abate Court's emphasized statement that under the circumstances of that case it would follow United States ex rel. Keating v. Bensinger, supra, 322 F. Supp. 784, is not necessarily inconsistent with the view that so long as there is a rational basis for the decision denying bail, the federal court will not intercede. Given the prosecutor's reliance on conclusory statements in Abate and the less serious nature of the crime there, it is not clear that there was a rational basis for the denial of bail. As such is not the case here, Appendix 34-43, 60-62, Abate does not control.

Given the policy of federal-state comity the federal court should not substitute its opinion for that of the state court in this, a matter which has been left to the discretion of the latter court. See p. 12, ante. And, as noted by Judge

Werker, Appendix 62, "to order the state court judge to state reasons for his rationally based denial of bail would amount to nothing more than exercise in futility."

CONCLUSION

THE ORDER OF THE DISTRICT COURT
DISMISSING THE PETITION SHOULD
BE AFFIRMED.

Dated: New York, New York
January 30, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Ghislaine Salomon , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent
herein. On the 31st day of January , 1978 , she served
the annexed upon the following named person :

RICHARD J. KLEIN
Attorney for Petitioner-Appellant
909 Sheridan Avenue
Bronx, New York 10451

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
31st day of January , 1978

Ghislaine Salomon

Clement H. Berne
Deputy Assistant Attorney General
of the State of New York